IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 174 of 1995

Judgment reserved on 7.3.2007

Date of decision 8.3.2007

Bhag Singh and others **…Appellants.**

Versus

Surinder Gandhi and others **…Respondents.**

Coram

The Hon'ble Mr. Justice : Surjit Singh, Judge.

Whether approved for reporting?

For the appellants: **Ms. Sunita Sharma, vice Mr. K.D. Sood, Advocate.**

For the respondents **: Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate.**

Surjit Singh, Judge

Appellants / plaintiffs filed a suit for declaration that the they were owners in possession of land bearing Khasra No. 410, meaksuring 1 Bigha 9 Biswas and that the entries in the Revenue papers showing the respondents / defendants in possession as mortgagees were wrong, illegal and contrary to the factual position. It was alleged that the suit land, i.e. land bearing Khasra No. 410, along-with some other land bearing various

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Whether reporters of Local Papers may be allowed to see the Judgment?

Khasra numbers, was earlier in possession of the father of the respondents / defendants as a mortgagee and that a suit was filed for redemption of the mortgage in which a decree was passed in favour of the appellants / plaintiffs and that that decree was affirmed by the Hon'ble High Court on 5.6.1974 and thereafter in execution of that decree possession of the entire mortgaged property, including the suit property, was delivered to the plaintiffs on 22.11.1976. But despite the execution of decree, entries were continuing in the revenue papers showing the defendants in possession of the suit land as mortgagees.

2. Respondents / defendants contested the suit and alleged that possession of the suit land remained with them after the passing of the decree of redemption and that though the possession of all other Khasra numbers was delivered to the plaintiffs in execution of the aforesaid decree of redemption, the possession of the suit land had not been delivered to the plaintiffs and that it remained with them (defendants) throughout and they had acquired title by prescription. It was also alleged that the Court did not have any jurisdiction, the suit was not maintainable, the plaintiffs were estopped to file the suit by their acts and conduct, the suit was barred by time, the plaintiffs had no cause of action and the suit was barred by rule of resjudicata.

3. Trial Court framed various issues and tried the matter. At the end findings on all the issues were recorded in favour of the plaintiffs and consequently the suit was decreed and decree declaring the appellants / plaintiffs as owners in possession of the suit land was passed.

4. Defendants went in appeal to the Court of District Judge. Reversing the finding of the trial Court that the possession of the suit land

had also been delivered to the plaintiffs in the execution of the earlier decree of redemption, the learned District Judge accepted the appeal, set aside the decree of the trial Court and dismissed the suit.

5. Appellants / plaintiffs then filed the present appeal, which was admitted on the following substantial questions of law:-

1. Whether the District Judge has erred in law in misconstruing the oral and documentary evidence more particularly Exts. P4, P6, P7, P2 and P3 and has wrongly held that the property in the previous suit was not the subject matter in the present suit and the same was not redeemed and possession not delivered to the appellant?

2. Whether the findings that the defendants are mortgagee in possession of the property and not redeemed within the period of 60 years, is sustainable and the suit of the plaintiff was not maintainable?

3. Whether the findings of the previous suit and the execution were resjudicata and it was open to the plaintiff to raise the plea that the property was not redeemed and he was still in possession of the property?

4. Whether it was established on the record that the revenue entries were wrong and the plaintiffs' suit has been rightly decreed by the court below in the facts and circumstances of the case?

6. I have heard the learned counsel for the parties and gone through the record.

7. The learned District Judge has returned the finding that Khasra No. 410 is the new number for old Khasra No. 849, but no documents had been placed on record to show that Khasra No. 849/1, measuring one Bigha 9 Biswas for which new Khasra No. 410 had been allotted in the Consolidation process, was the subject matter of the earlier

suit for redemption of mortgage or that its possession had been delivered to the plaintiffs at any point of time.

8. Another reason recorded by the first Appellate Court to reverse the decree of the trial Court is that none of the plaintiffs entered the witness box in support of the plea that possession had been delivered to the plaintiffs and so an adverse inference was required to be drawn against them.

9. The view taken by the first Appellate Court is not correct. The plaintiffs placed on record copy of the decree passed in the earlier suit as also copy of the warrant of possession and the report submitted by the Kanungo after executing the warrant. Ext. P-4 is the copy of the decree passed in the earlier suit. As per this decree 1/6th share of land entered against Khewat No. 11, Khatauni Nos. 21 and 22, Khasra Nos. 849 to 851 was included in the subject matter of the previous suit for redemption of mortgage. Certified copy of the warrant of possession Ext. P-2 shows that 1/6th share of land, bearing Khasra Nos. 849 to 851 had also been included. Similarly, the report of the Kanungo, recorded on the warrant Ext. P-2, also shows that the possession of 1/6th share of Khasra No. 849 to 851 stood delivered to the plaintiffs in execution of the warrant of possession. Misal Hakiat, copy Ext. P-5, shows that Khasra No. 410 has been assigned to the land comprised in old Khasra No. 849/1, measuring one Bigha 9 Biswas.

10. Learned District Judge has observed that Khasra No. 849/1 is a portion of the whole Khasra No. 849 and since the warrant of possession and the report of the Kanungo do not depict the portion of Khasra No. 849 possession of which had been ordered to be delivered and the plaintiffs having not filed the copy of any Jamabandi for the period prior to the

preparation of the Misal Hakiat Ext. P-5, indicating as to what was the total area of the whole Khasra No. 849, it cannot be inferred that possession of Khasra No. 849/1, corresponding to new Khasra No. 410, was delivered to the plaintiffs. The view taken by the first Appellate Court is erroneous. As per Misal Hakiat for the years 1976-77, copy Ext. P-5, defendants are recorded in possession of the suit land, i.e. old Khasra No. 849/1 and new Khasra No. 410 as mortgagees. It is not the case of the defendants that they possessed some other portion of Khasra No. 849 in addition to portion depicted by Khasra No. 849/1 as mortgagees and it was that portion the possession of which had been delivered to the plaintiffs and the possession of Khasra No. 849/1 remained with them. As a matter of fact, one of the appellants, namely Nand Lal, who entered the witness box as DW-1, very categorically stated that at the time of the execution of the warrant the defendants were told that mortgage in respect of the suit land had been kept intact and, therefore, the possession remained with them. The statement clearly suggests that the suit land is part of the land that was mortgaged with the defendants. What was mortgaged with them, as regards Khasra No. 849, was 1/6th part of it. In the light of the statement of Nand Lal DW-1 as also the entry in the Misal Hakiat Ext. P-5 in which the defendants are recorded in possession as mortgagees, there remains no manner of doubt that the suit land was part of the land, which had been mortgaged with their predecessor. Admittedly suit was filed for redemption of the mortgage in its entirety and the same had been decreed in respect of the entire mortgaged property. That means what-ever portion of Khasra No. 849 was mortgaged with the defendants, stood redeemed and when

the decree of redemption was executed, possession of the said portion was delivered to the plaintiffs.

11. Drawl of adverse inference by the first Appellate Court against the appellants / plaintiffs for non-appearance of any-one of them as witness is also not justified. Case of the appellants / plaintiffs was based on documentary evidence, i.e. decree passed in the earlier suit, petition filed for execution of the said decree, warrant of possession and the report of the Kanungo, who executed the warrant. All these documents were produced by the appellants / plaintiffs. Oral testimony of the plaintiffs with regard to the filing of the suit for redemption and the delivery of possession in execution of the decree passed in that suit would have been meaningless and just repetition of the contents of the aforesaid documents.

12. In view of the above stated position, it is held that the first Appellate Court has erred in law in not construing correctly the oral and documentary evidence regarding redemption of mortgage and delivery of possession of the suit land to the appellants in execution of the decree for redemption of mortgage. It is also held that the mortgage had been redeemed within sixty years and the possession had also been recovered by the appellants / plaintiffs by executing the decree for redemption of mortgage. Further it is held that the fact that there was a decree of redemption of mortgage and it stood executed, rendered the plea of the respondents / defendants that there was no decree of redemption of mortgage in respect of the suit land or that its possession had not been taken from them in execution of the decree, res judicata. Also, it is held that the trial Court had rightly appreciated the evidence and decreed the suit of the plaintiffs / appellants.

13. In view of the above stated position, all the four substantial questions of law, on which the appeal was admitted, are answered in favour of the appellants / plaintiffs.

14. As a result of the above discussion and findings, appeal is accepted. Judgment and decree of the first Appellate Court (District Judge) are set aside and the decree passed in favour of the appellants / plaintiffs by the trial Court is restored. Appeal stands disposed of accordingly.

March 8, 2007 (BC) **(Surjit Singh)**
Judge